

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Neil Rusty Bond,

Plaintiff,

v.

Commissioner of Social Security
Administration,

Defendant.

No. CV-19-04933-PHX-JAT

ORDER

Pending before the Court is the Motion to Dismiss (Doc. 24) for lack of subject matter jurisdiction filed by Defendant Commissioner of Social Security Administration (“Commissioner”). The Motion (Doc. 24) has been fully briefed.¹ (Doc. 24; Doc. 34; Doc. 36). The Court now rules.

I. BACKGROUND

Plaintiff Neil Rusty Bond (“Plaintiff”) collected disability insurance benefits from 1991 to 1999. (Doc. 9 at 2; Doc. 34 at 2). The Commissioner asserts that the Social Security Administration (“Administration”) “determined that Plaintiff had been engaged in substantial and gainful work activity and his benefits should have been suspended effective

¹ Plaintiff Neil Rusty Bond also filed a surreply (Doc. 38). Surreplies are not permitted in the District of Arizona without the court’s approval. *Spina v. Maricopa Cty. Dep’t of Transp.*, No. CV05-0712-PHX-SMM, 2009 WL 890997, at *1 (D. Ariz. Apr. 1, 2009). Although the Court will not consider the Surreply (Doc. 38), the Court nonetheless reviewed it, and consideration of the arguments contained therein would not affect the outcome.

1 August 1996 and terminated effective May 1999.” (Doc. 24 at 3 (citing Doc. 1-1² at 14–
2 18)). Plaintiff was convicted of theft of government property and of Social Security fraud.
3 (*Id.* (citing Doc. 1-1 at 8–11; Doc. 9 at 2, 11)). The court ordered Plaintiff to pay restitution
4 in the amount of \$88,800.70. (Doc. 9 at 2; Doc. 24 at 3). Plaintiff eventually prevailed on
5 collateral review, and the court resentenced Plaintiff and ordered him to pay the reduced
6 amount of \$30,929.16 in restitution. (Doc. 1-1 at 9; *see also* Doc. 9 at 4 (stating,
7 inaccurately, that the restitution award was reduced to \$30,926.16)).

8 In the meantime, on May 19, 2003, the Administration sent a notice to Plaintiff that
9 he was liable for overpayment in the amount of \$67,494.70 and that future benefits would
10 be withheld to collect that amount. (Doc. 1-1 at 15; Doc. 9 at 2, 20). According to Plaintiff,
11 on June 1, 2003, he sent a letter to the Administration, in which Plaintiff stated: “I was not
12 overpaid these benefits according to the Social Security guidelines. Please send me a
13 request for reconsideration and a request for waiver form. I would like to have a hearing
14 with Social Security to present my net income as soon as possible. Thank you, Neil Bond.”
15 (Doc. 1-1 at 20; *see also* Doc. 9 at 11). Plaintiff alleges, and the record indicates, that the
16 Administration never responded. (Doc. 9 at 10–11; *see* Doc. 36-1 at 4).

17 Plaintiff filed for Title II retirement insurance benefits in November 2015. (Doc. 24
18 at 3; Doc. 24-1 at 4). In December 2015, the Administration informed Plaintiff that he was
19 entitled to monthly retirement benefits of \$1027 as of June 2015 (save for his first check
20 which appears to have been prorated), but that his benefits were subject to withholding to
21 recover \$67,119.70³ in overpayments. (Doc. 24 at 3; Doc. 24-1 at 11; *see* Doc. 9 at 4). The
22 Administration has been collecting the full amount of benefits each month since that time.
23 (Doc. 24-1 at 11; *see* Doc. 9 at 4).

24
25 ² As the Commissioner notes, it appears Plaintiff accidentally failed to attach the exhibits he
26 attached to the original Complaint (Doc. 1). (Doc. 24 at 2 n.2). Because the Amended
27 Complaint’s references to exhibits corresponds with the exhibits attached to the original
28 Complaint (Doc. 1), the Court assumes Plaintiff incorporated those exhibits into the
Amended Complaint (Doc. 9) consistent with the Court’s duty to liberally construe a pro
se plaintiff’s pleadings. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).

³ This number is lower than the original \$67,494.70 discussed above as the Administration
had already collected some of the overpayment amount. (*See* Doc. 24-1 at 32).

1 Plaintiff sought reconsideration, particularly that the overpayment amount should
2 be lowered. (Doc. 24 at 3–4; Doc. 24-1 at 14; *see* Doc. 9 at 4). Plaintiff asserted that the
3 restitution amount of \$30,929.16 is what he owes the Administration in overpayments and
4 that the Administration should only recoup that amount. (Doc. 24-1 at 14; *see* Doc. 9 at 4).
5 The Administration denied the request for reconsideration, stating that “any protest
6 regarding the fact or amount of the overpayment has been previously addressed.” (Doc. 24-
7 1 at 32; *see* Doc. 9 at 11–12; Doc. 24 at 4). Plaintiff then sought a hearing before an
8 administrative law judge (“ALJ”), which the ALJ denied. (Doc. 24 at 4; Doc. 24-1 at 34–
9 39). In denying the hearing, it appears that the ALJ adopted the rationale from the
10 Administration’s reconsideration determination as the ALJ concluded, “[t]he overpayment
11 amount has been previously addressed and the claimant is not entitled to any additional
12 appeal rights in this regard.” (Doc. 24-1 at 38–39; *see* Doc. 24 at 4–5). Plaintiff appealed
13 the ALJ’s decision to the Appeals Council, and Plaintiff indicated that he “was never
14 granted a hearing by Social Security from 2003 through 2005.” (Doc. 24-1 at 42). The
15 Appeals Council denied Plaintiff’s appeal of the ALJ’s decision. (Doc. 24-1 at 55–56;
16 Doc. 24 at 5).

17 However, the Commissioner notes that the Appeals Council recently recognized in
18 February 2020, after the Commissioner’s Motion to Dismiss (Doc. 24) was filed, that
19 Plaintiff “did not receive a reconsideration determination in regard to the original
20 overpayment notice of May 19, 2003” and that the May 2003 “notice, informing [Plaintiff]
21 that [Plaintiff was] overpaid \$67,494.70 in disability benefits, did not provide detailed
22 computations regarding the overpayment fact and amount, the issues of trial work period
23 and extended period of eligibility, the month of cessation, or the month of termination.”
24 (Doc. 36-1 at 4; Doc. 36 at 2). The Appeals Council nonetheless concurred with the ALJ’s
25 assessment that the “only appealable issue in [Plaintiff]’s December 9, 2015 notice of
26 award of monthly retirement benefits was whether the benefits should be withheld to
27 recoup an outstanding overpayment balance of \$67,119.70.” (*Id.*). The Appeals Council
28 proposed that Plaintiff “dismiss [his] September 13, 2016 request for hearing for a different

1 reason than the one cited by the Administrative Law Judge, and return [the] case to [the]
2 local social security office for a detailed reconsideration determination relative to the
3 overpayment notice of May 19, 2003.” (*Id.*).

4 **II. LEGAL STANDARD**

5 “Federal courts are courts of limited jurisdiction,” possessing “only that power
6 authorized by [the] Constitution and statute.” *Kokkonen v. Guardian Life Ins. Co. of Am.*,
7 511 U.S. 375, 377 (1994). Consequently, a defendant may seek dismissal under Federal
8 Rule of Civil Procedure 12(b)(1), at any time, to challenge whether a federal court has
9 jurisdiction to hear the subject matter of a case. *See* Fed. R. Civ. P. 12(b)(1), (h)(3).
10 “[W]hen subject matter jurisdiction is challenged under Federal Rule of Civil Procedure
11 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion.”
12 *Kingman Reef Atoll Invs., L.L.C. v. United States*, 541 F.3d 1189, 1197 (9th Cir. 2008).
13 Nonetheless, where a plaintiff is proceeding pro se, the court must construe the allegations
14 in the complaint liberally. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).

15 **III. ANALYSIS**

16 The Commissioner argues the Court must dismiss this case because it lacks subject
17 matter jurisdiction. (Doc. 24). Specifically, the Commissioner asserts that the Court only
18 has jurisdiction to hear a challenge to a final decision made by the Commissioner and that
19 Plaintiff’s Amended Complaint (Doc. 9) does not properly assert a challenge to any final
20 decision made by the Commissioner. (Doc. 24 at 2–3).

21 This Court has jurisdiction under 42 U.S.C. § 405(g) to review a decision made by
22 the Commissioner. That section provides:

23 Any individual, *after any final decision of the Commissioner of Social*
24 *Security made after a hearing* to which he was a party, irrespective of the
25 amount in controversy, may obtain a review of such decision by a civil action
26 commenced within sixty days after the mailing to him of notice of such
27 decision or within such further time as the Commissioner of Social Security
28 may allow.

1 42 U.S.C. § 405(g) (emphasis added). Thus, in the Social Security context, judicial review
 2 only extends to “final decision[s] . . . made after a hearing.” *Id.* § 405(g)–(h); *see Smith v.*
 3 *Berryhill*, 139 S. Ct. 1765, 1773–74 (2019).

4 Congress did not define the term “final decision . . . made after a hearing.” *See* 42
 5 U.S.C. § 405(g). But, it has become axiomatic that Congress intended for the
 6 Commissioner to promulgate regulations to define the procedures that result in a final
 7 decision. *See, e.g., Smith*, 139 S. Ct. at 1777. A decision is final after a four-step process.
 8 20 C.F.R. § 404.900(a)(1)–(5). The steps are as follows: (1) initial determination,
 9 (2) request for reconsideration of the initial determination, (3) request for hearing before
 10 an ALJ, and (4) review of the request for hearing before the Appeals Council. *Id.* Thus, the
 11 Commissioner has made a reviewable “final decision” when steps one through four are
 12 completed. *Id.* § 404.900(a)(5).

13 At first blush, it seems simple that judicial review only extends to decisions made
 14 by the Commissioner where the claimant has exhausted her administrative remedies
 15 through the four-step process. In other words, the general rule is that there cannot be
 16 judicial review unless the claimant properly exhausted her administrative remedies
 17 because, without exhaustion, there is no final decision for the court to review. *See Califano*
 18 *v. Sanders*, 430 U.S. 99, 103 n.3, 108 (1977). However, a court can excuse a failure to
 19 exhaust as the exhaustion requirement is not jurisdictional. *Smith*, 139 S. Ct. at 1774.

20 It is clear based on the record and the Amended Complaint (Doc. 9) that Plaintiff
 21 sought relief as to the overpayment amount. (Doc. 24-1 at 38–39). An overpayment
 22 determination can be a final decision, made after hearing, that is subject to judicial review
 23 if the claimant properly exhausts her administration remedies.⁴ *See McCarthy v. Apfel*, 221
 24 F.3d 1119, 1123–24 (9th Cir. 2000); 20 C.F.R. § 404.900(a)(1) (stating “[i]nitial
 25 determination” includes “a determination we make about your entitlement or your

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 27 ⁴ The Court is perplexed by the Commissioner’s assertion that “Plaintiff cannot use the
 28 reconsideration and hearing request processes as a vehicle to appeal the overpayment
 amount.” (Doc. 24 at 8). An overpayment determination, including the calculation of the
 amount owed, can result in a final decision that is appealable. *See, e.g., McCarthy v. Apfel*,
 221 F.3d 1119, 1123–24 (9th Cir. 2000).

1 continuing entitlement to benefits or about any other matter, as discussed in [20 C.F.R.]
 2 § 404.902, that gives you a right to further review”); *id.* § 404.902(j), (k) (providing initial
 3 determinations that are subject to judicial review include determinations about “[a]ny
 4 overpayment or underpayment of your benefits” and “[w]hether an overpayment of
 5 benefits must be repaid to us”). The Commissioner’s determination of a particular
 6 overpayment amount must be supported by substantial evidence. *McCarthy*, 221 F.3d at
 7 1124.

8 The typical overpayment decision starts with an *ex parte* determination that an
 9 overpayment has been made, notification of that determination to the recipient, and shifting
 10 of the burden to the recipient to “(i) seek[] reconsideration to contest the accuracy of that
 11 determination[] or (ii) ask[] the [Commissioner] to forgive the debt and waive recovery.”
 12 *Califano v. Yamasaki*, 442 U.S. 682, 686–87 (1979). If the claimant seeks reconsideration
 13 or waiver, the Administration’s long-standing practice has been to defer recoupment at
 14 least until the initial determination has been upheld on reconsideration. *See id.*; *Mattern v.*
 15 *Weinberger*, 519 F.2d 150, 154 (3d Cir. 1975), *vacated sub nom. Mathews v. Mattern*, 425
 16 U.S. 987 (1976); Overpayment Appeal and Waiver Rights, 61 Fed. Reg. 56,126-01, 56,218
 17 (Oct. 31, 1996) (“If the individual responds within 30 days after the date of the
 18 overpayment notice, SSA must take action to ensure that benefit payments are not
 19 interrupted.”); Soc. Sec. Admin., *Form SSA-3105*, at 2 (2017), *discussed in* 61 Fed. Reg.
 20 at 56,128; Soc. Sec. Admin., *Program Operations Manual System (POMS)* § GN
 21 02201.011 (2012) [hereinafter POMS] (“Stop recovery effective with the month the
 22 overpaid person: requests reconsideration or waiver; requests an explanation of the
 23 overpayment”); POMS, *supra*, § GN 02201.017 (“We must stop recovery efforts until
 24 we provide the overpaid person an explanation, and give him or her an opportunity to
 25 decide how to respond to the explanation.”).⁵ “If it is decided that the [Commissioner]’s

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 27 ⁵ The Court recognizes that the POMS is not binding on the Commissioner under Ninth
 28 Circuit law. The POMS can have persuasive value “to the extent it provides a persuasive
 interpretation of an ambiguous regulation,” but it does not create any enforceable duties on
 either the reviewing court or the Commissioner. *See Carillo-Yeras v. Astrue*, 671 F.3d 731,

1 initial determination was in error, the amounts wrongfully recouped are repaid.” *Yamasaki*,
 2 442 U.S. at 686–87.

3 Here, the Administration issued its initial overpayment determination in May 2003.
 4 Plaintiff alleges he sought reconsideration of the overpayment decision in a letter dated
 5 June 1, 2003. (Doc. 9 at 6). The Administration never responded. (*Id.* at 2; *see also* Doc. 36-
 6 1 at 4). It was not until February 2020 when the Appeals Council recognized the error.
 7 (Doc. 36-1 at 4).

8 The key issue here is whether there is a final decision for the Court to review. The
 9 Commissioner argues there is no final decision on review before this Court. (Doc. 24 at 6).
 10 The Commissioner’s logic is as follows: Plaintiff appealed the withholding notice he
 11 received in December 2015 and that notice made no decision, and thus, it is not an
 12 appealable final decision. (*Id.* at 8–9). The Commissioner further reasons that Plaintiff must
 13 exhaust his administration remedies as to the May 2003 initial determination that notified
 14 him of the allegedly erroneous overpayment amount before the exhaustion requirement can
 15 be met and an appealable final decision rendered. (*See id.*; Doc. 36 at 3). In sum, there is
 16 no final decision on review because, according to the Commissioner, the 2015 withholding
 17 notice is not a final decision and the May 2003 initial determination on the overpayment

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 19 735 (9th Cir. 2011); *Moore v. Apfel*, 216 F.3d 864, 868–69 (9th Cir. 2000). Even so, the
 20 administrative review process of an overpayment determination outlined by the POMS is
 21 binding. First, the Administration has stated that the regulations it promulgated were
 22 intended to effectuate the procedures contained in the program instructions. *See* 61 Fed.
 23 Reg. at 56,218. The Administration’s internal guidelines have articulated for decades that
 24 the Administration must defer recoupment of overpayments where a claimant requests
 25 reconsideration. *See Yamasaki*, 442 U.S. at 686–87; *Mattern*, 519 F.2d at 154 & n.5. Further,
 26 “[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their
 27 own procedures.” *Morton v. Ruiz*, 415 U.S. 199, 235 (1974), *quoted in Alcaraz v. I.N.S.*,
 28 384 F.3d 1150, 1162 (9th Cir. 2004); *Newton v. Apfel*, 209 F.3d 448, 459 (5th Cir. 2000).
 The Court finds that, given the fact that an overpayment determination results in the
 withholding of benefits until the amount is paid in full, *see* 20 C.F.R. § 404.502(a), a
 decision calculating the amount of overpayment is one that affects the rights of individuals,
 and thus, the Administration must adhere to its own guidance under *Ruiz*. Finally, the Court
 views POMS, *supra*, §§ GN 02201.011, GN 02201.017 as persuasive interpretations of
 how the Administration must process an overpayment determination under 20 C.F.R.
 § 404.502(a). *See Carillo-Yeras*, 671 F.3d at 735; *see also Yamasaki*, 442 U.S. at 696 (“The
 statute authorizes only ‘proper’ recoupment” (quoting 42 U.S.C. § 405(a))). Therefore,
 where a request for reconsideration of an overpayment determination is made, the Court
 finds that the Administration is bound by its long-standing practice of deferring
 recoupment until the overpayment determination is upheld.

1 amount is neither before this Court nor is it a final decision. However, the Court may excuse
2 the need for a final decision here because Plaintiff presents a colorable due process claim
3 under the Fifth Amendment.

4 The judicial review provision under 42 U.S.C. § 405(g) has two separate
5 components. One component, that a plaintiff's claim must first be presented to the
6 Administration, is jurisdictional. *Smith*, 139 S. Ct. at 1773. Plaintiff presented his claim to
7 the Administration, so the jurisdictional requirement is satisfied. The second, that a plaintiff
8 exhaust her administrative remedies before bringing the claim to the federal judiciary, is
9 waivable by the Commissioner or excusable by a federal court, as noted above. *Id.* at 1773–
10 74. The exhaustion requirement may be excused where the plaintiff's claim is:
11 “(1) collateral to a substantive claim of entitlement (collaterality), (2) colorable in its
12 showing that denial of relief will cause irreparable harm (irreparability), and (3) one whose
13 resolution would not serve the purposes of exhaustion (futility).” *Johnson v. Shalala*,
14 2 F.3d 918, 921 (9th Cir. 1993).

15 Simply stated, the determination of whether a court should excuse the exhaustion
16 requirement “is influenced by the existence in the controversy of a collateral colorable
17 [c]onstitutional challenge that is unsuited to resolution in the relevant administrative form.”
18 *Klein v. Sullivan*, 978 F.2d 520, 524 (9th Cir. 1992) (excusing exhaustion requirement
19 where requiring exhaustion “would not answer [the] constitutional challenge” (citation
20 omitted)). A due process claim that alleges procedural errors is typically exempt from the
21 exhaustion requirement. *See id.*; *see also Sanders*, 430 U.S. at 109; *Mathews v. Eldridge*,
22 424 U.S. 319, 330–31 (1976).

23 Plaintiff has articulated a colorable due process claim. The Supreme Court has made
24 clear that a claimant does *not* have a right to a pre-recoupment hearing where the claimant
25 seeks reconsideration of an overpayment determination. *Yamaski*, 442 U.S. at 695–97
26 (concluding that there is a right to pre-recoupment hearing where a claimant seeks waiver
27 of the overpayment decision but not reconsideration). Nonetheless, as discussed above, the
28 Administration has a long-standing practice of deferring recoupment until a claimant's

request for reconsideration is processed. *See supra* pp. 5–6 & note 5. Processing of a request for reconsideration includes a review of any written evidence the claimant sends in. *See, e.g., Mattern v. Mathews*, 582 F.2d 248, 258 (3d Cir. 1978). Courts have noted that the Administration’s long-standing practice of deferring recoupment until the documentary review is complete plus the opportunity for a post-recoupment hearing satisfies due process. *See, e.g., Yamaski*, 442 U.S. at 686–87; *Mattern*, 582 F.2d at 258; *see also Yamaski*, 442 U.S. at 696 (“The statute authorizes only ‘proper’ recoupment” (quoting 42 U.S.C. § 404(a))). However, the Administration did not abide by those procedures here. It is unlikely that the Administration can withhold entitlements for recoupment under the Due Process Clause without any opportunity for review of an initial overpayment determination. As such, Plaintiff’s Amended Complaint (Doc. 9), liberally construed, states a colorable constitutional claim as it asserts a right to be heard—even if by written submission only—prior to recoupment under the Due Process Clause. Therefore, the three-part test for excusing exhaustion has been met here.

a. Collaterality

First, Plaintiff’s due process claim is collateral because it does not simply assert entitlement to benefits but rather Plaintiff alleges that the Administration violated his right to be heard, which resulted in wrongfully withheld benefits. *Johnson*, 2 F.3d at 921–22; *see Klein*, 978 F.2d at 523–24 (“However, \$26,737.56 is no longer what appellants allege this case is all about. . . . [A]ppellants’ complaint lays claim to numerous [c]onstitutional causes of action arising out of the Department’s alleged mishandling of their claim for reimbursement.”). The Court’s decision as to Plaintiff’s due process claim need not “interfere[] with agency process” because all that is required is that the Administration comply with its own procedures. *Johnson*, 2 F.3d at 922; *see supra* pp. 5–6 & note 5. Plaintiff’s procedural challenge “rises and falls on its own” without reference to the overpayment amount. *Johnson*, 2 F.3d at 921–22. Plaintiff’s due process claim is therefore collateral to the merits—the amount of overpayment he owes the Administration.

1 **b. Irreparability**

2 Plaintiff has alleged a colorable claim of irreparable injury. An injury is irreparable
3 if it cannot be remedied “by retroactive payments at some later time.” *Briggs v. Sullivan*,
4 886 F.2d 1132, 1140 (9th Cir. 1989). Plaintiff has gone about seventeen years without a
5 reconsideration or adequate explanation of the overpayment amount that was articulated in
6 the May 2003 initial determination. Nonetheless, the Administration, in violation of its own
7 long-standing practice, began withholding Plaintiff’s retirement benefits to recoup that
8 overpayment amount.

9 At bottom, Plaintiff’s due process claim is irreparable because it will not be
10 remedied by simply awarding him the amount he is owed in back payments through the
11 administrative appeal process. “[E]conomic hardship suffered by the plaintiffs while
12 awaiting administrative review constitutes irreparable injury.” *Johnson*, 2 F.3d at 922. “It
13 is simply not true that a claimant for disability benefits, not infrequently in dire financial
14 circumstances due to his disability, is truly made whole by retroactive payments which he
15 has had to survive well over a year without.” *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th
16 Cir. 1983) (citation omitted).⁶

17 Withholding of Plaintiff’s retirement benefits became effective as of June 2015,
18 which is when Plaintiff became entitled to monthly retirement benefits. (Doc. 24-1 at 11).
19 Each month, the entire amount Plaintiff is entitled to—\$1027—is withheld. (*Id.*). That
20 means approximately fifty-nine months of payments have been withheld for a total of about
21 \$60,000. If Plaintiff is correct that the true overpayment amount is \$30,929.16, that means
22 nearly \$30,000 has been wrongfully withheld. Worse yet, if Plaintiff is correct, that means
23 he has gone without benefits he is entitled to for about *twenty-nine* months. The
24 Administration’s proposal after it realized its failure to respond to Plaintiff’s request for
25 reconsideration was to recommend that Plaintiff seek reconsideration of the May 2003
26 initial determination now after withholding—in violation of the Administration’s own

27 _____
28 ⁶ The Court understands that Plaintiff is not seeking disability benefits. But, he does claim
he is disabled, and thus, his disability could have affected his ability to work, putting him
in the “dire financial circumstances” that *Lopez* discusses. (Doc. 9 at 2, 6, 11, 16).

1 procedures—approximately twenty-nine months of entitlements at \$1027 a month to the
2 tune of about \$30,000.

3 It took nearly a year for the Administration to review Plaintiff’s claim after he
4 received the December 2015 withholding notice and promptly sought reconsideration.
5 (Doc. 24-1 at 32–33). Therefore, Plaintiff may go approximately another twelve months
6 without the benefits he is entitled to. If the reconsideration goes against Plaintiff, it could
7 take years before an ALJ hears his appeal. In fact, it took four years from the time Plaintiff
8 sought reconsideration for the ALJ to decide Plaintiff’s first appeal. (Doc. 24-1 at 38–39).
9 All told, if Plaintiff is correct about the overpayment amount, it could be years before he
10 finally gets relief for something that should have never happened in the first place. The
11 Court underscores the fact that it was the *Administration’s* errors that have caused this issue
12 to not be dealt with in a timely manner.

13 It is true that administrative delay in managing a national administrative scheme is
14 expected and even necessary at times. *See Machado v. Leavitt*, 542 F. Supp. 2d 185, 195
15 (D. Mass. 2008). But, “delay without justification clearly falls outside of constitutional
16 bounds.” *Id.* (citing *Kraebel v. N.Y. City Dep’t of Hous. Preservation & Dev.*, 959 F.2d
17 395, 405 (2d Cir. 1992) (“[D]elay in processing can become so unreasonable as to deny
18 due process.”)); *Kelly v. R.R. Ret. Bd.*, 625 F.2d 486, 490–91 (3d Cir. 1980) (stating delay
19 of “nearly four years[] is wholly inexcusable” and “totally out of phase with the
20 requirements of fairness”); *Parker v. R.R. Ret. Bd.*, 441 F.2d 460, 464 (7th Cir. 1971) (“The
21 application has been pending now for over six years and we see no reason to remand the
22 case for the taking of further testimony.”). An individual only retires once, and the
23 Administration has impaired years of Plaintiff’s retirement through the uncertainty it
24 created as a result of its errors. *Strobel v. Morgan Stanley Dean Witter*, No.
25 04CV1069BEN(BLM), 2007 WL 1238709, at *3 (S.D. Cal. Apr. 24, 2007); *see also*
26 *Machado*, 542 F. Supp. 2d at 189 (“Plaintiffs have undisputedly endured months of futile,
27 and no doubt maddening, attempts to remedy improper withholdings—contacting the
28 [Administration], CMS, and their plan providers on numerous occasions only to be met

1 with disclaimers of responsibility or false reassurances that the problem would soon be
2 corrected.”). Plaintiff is not only entitled to retirement benefits, but he also claims he is
3 disabled. (Doc. 9 at 2, 6, 11, 16). “Society’s interest lies on the side of affording fair
4 procedures to all persons, even though the expenditure of governmental funds is required.
5 It would be tragic, not only from the standpoint of the individuals involved but also from
6 the standpoint of society, were poor, elderly, disabled people to be wrongfully deprived of
7 essential benefits for *any period of time*.” *Lopez*, 713 F.2d at 1437 (emphasis added).

8 By contrast, the Administration offers no justification for its five-year delay (or
9 seventeen-year delay if the clock began ticking when Plaintiff originally sought
10 reconsideration). In fact, the Administration has offered no excuse for the delay here. *See*
11 *Machado*, 542 F. Supp. 2d at 195–97 (finding that plaintiffs articulated a colorable due
12 process claim where justification for administrative delay of “well over a year” was unclear
13 given that delay appeared to have been caused by a failure to perform “relatively
14 straightforward” corrections). To delay further would continue to work and exacerbate a
15 manifest injustice against Plaintiff, especially considering that the Administration was not
16 to begin recouping payments until it provided a detailed explanation and computation in
17 response to Plaintiff’s request for reconsideration of the overpayment amount. *See supra*
18 pp. 5–6 & note 5. There is irreparable harm here.

19 **c. Futility**

20 Finally, exhaustion will not cure the alleged due process violation rendering
21 exhaustion futile. “Constitutional questions obviously are unsuited to resolution in
22 administrative hearing procedures and, therefore, access to the courts is essential to the
23 decision of such questions.” *Sanders*, 430 U.S. at 109. It is a “well-established principle
24 that when constitutional questions are in issue, the availability of judicial review is
25 presumed.” *Id.* Again, it has been years without the appropriate reconsideration. Indeed,
26 Plaintiff has already gone through the administrative appeals process once to no avail. The
27 Administration’s errors caused the Administration to fail to properly deal with Plaintiff’s
28 claim. The Administration has still not eliminated uncertainty as to whether Plaintiff will

1 actually receive the proper reconsideration. Should the Court dismiss this case for failure
2 to exhaust, Plaintiff may end up in the same place, just years later.

3 The Commissioner is correct that the determination as to the overpayment amount
4 is properly entrusted to the Administration for reconsideration in the first instance. (Doc. 36
5 at 3). But, this case has gone far beyond that simple issue. Neither the Administration's
6 expertise nor compiling of a detailed factual record is necessary to resolving Plaintiff's due
7 process claim. *Briggs*, 886 F.2d at 1140. There is simply no need for administrative review
8 of Plaintiff's allegations that the Administration violated its own procedures by
9 withholding benefits despite failing to respond to Plaintiff's request for reconsideration. In
10 short, exhaustion will "not answer [Plaintiff's] constitutional challenge." *Klein*, 978 F.2d
11 at 524 (citation omitted).

12 **d. Conclusion**

13 To the extent Plaintiff failed to exhaust his administrative remedies as to the May
14 2003 overpayment determination, the Court excuses such failure, as Plaintiff has
15 articulated a colorable due process violation. In short, it is time to ensure that this case will
16 be resolved without further unnecessary delay. *See Klein*, 978 F.2d at 524. Accordingly,
17 the Court will deny the Motion to Dismiss (Doc. 24).

18 The Court is disheartened by the Administration's treatment of this case. The
19 Commissioner could have simply requested that the Court remand this case for
20 reconsideration after he recognized the errors that occurred here. Instead, after the Appeals
21 Council revealed the errors that occurred in this case, (Doc. 36-1), the Commissioner
22 doubled-down on his original argument that the Court lacked subject matter jurisdiction
23 and essentially asked Plaintiff to trust that the Administration will get it right this time,
24 seventeen years after his original request for reconsideration and nearly five since the
25 Administration began withholding Plaintiff's benefits in violation of the Administration's
26 own procedures.

27 The Commissioner's position is not in accord with the fact that the Social Security
28 Act "as a whole is one that Congress designed to be unusually protective of claimants."

1 *See Smith*, 139 S. Ct. at 1776 (internal quotation marks and citation omitted). The
 2 Commissioner’s rather flippant suggestion that the Court should dismiss Plaintiff’s case
 3 despite the compounded errors that span nearly seventeen years and that have cost Plaintiff
 4 potentially \$30,000 in wrongfully withheld entitlements and undoubtedly countless hours
 5 of frustration simply does not square with the fact that Congress did not “intend[] for this
 6 claimant-protective statute, to leave a claimant without recourse to the courts when such a
 7 mistake does occur—least of all when the claimant may have already expended a
 8 significant amount of likely limited resources in a lengthy proceeding.” *Id.* (citation
 9 omitted). In any event, because Plaintiff has articulated a colorable due process claim, the
 10 Court will deny the Motion to Dismiss (Doc. 24).

11 **IV. PLAINTIFF’S MOTION FOR AN EVIDENTIARY HEARING**

12 Also pending before the Court is Plaintiff’s Motion for an Evidentiary Hearing
 13 (Doc. 33). That Motion (Doc. 33) will be denied as there is no need for an evidentiary
 14 hearing at this time.

15 **V. CONCLUSION**

16 The Court will deny the Motion to Dismiss (Doc. 24). It seems that a sentence six
 17 remand pursuant to 42 U.S.C. § 405(g)⁷ may be appropriate given the errors that the
 18 Commissioner has brought to the Court’s attention. *See Seaborn v. Sullivan*, 822 F. Supp.

19 ⁷ Sentence six of 42 U.S.C. § 405(g) provides:
 20

21 The court may, on motion of the Commissioner of Social Security made for
 22 good cause shown before the Commissioner files the Commissioner’s
 23 answer, remand the case to the Commissioner of Social Security for further
 24 action by the Commissioner of Social Security, and it may at any time order
 25 additional evidence to be taken before the Commissioner of Social Security,
 26 but only upon a showing that there is new evidence which is material and
 27 that there is good cause for the failure to incorporate such evidence into the
 28 record in a prior proceeding; and the Commissioner of Social Security shall,
 after the case is remanded, and after hearing such additional evidence if so
 ordered, modify or affirm the Commissioner’s findings of fact or the
 Commissioner’s decision, or both, and shall file with the court any such
 additional and modified findings of fact and decision, and, in any case in
 which the Commissioner has not made a decision fully favorable to the
 individual, a transcript of the additional record and testimony upon which the
 Commissioner’s action in modifying or affirming was based.

42 U.S.C. § 405(g).

1 121, 124–25 (S.D.N.Y. 1993). The Commissioner shall file a brief as to the propriety of a
2 sentence six remand by **Wednesday, June 3, 2020**. Plaintiff may respond within one week
3 of that briefing deadline. There shall be no reply brief.

4 Accordingly,

5 **IT IS ORDERED** that the Commissioner's Motion to Dismiss (Doc. 24) is
6 **DENIED**.

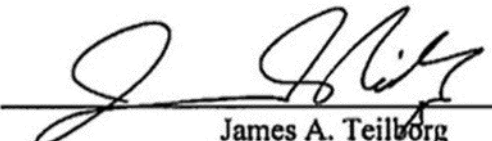
7 **IT IS FURTHER ORDERED** that the Commissioner shall file a brief, not to
8 exceed ten pages, on the propriety of a sentence six remand pursuant to 42 U.S.C. § 405(g)
9 by **Wednesday, June 3, 2020**.

10 **IT IS FURTHER ORDERED** that Plaintiff may file a response brief, not to exceed
11 ten pages, on the propriety of a sentence six remand pursuant to 42 U.S.C. § 405(g) by
12 **Wednesday, June 10, 2020**.

13 **IT IS FURTHER ORDERED** that Plaintiff Neil Rusty Bond's Motion for an
14 Evidentiary Hearing (Doc. 33) is **DENIED**.

15 Dated this 20th day of May, 2020.

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James A. Teilborg
Senior United States District Judge